selection.[20] In other words, if the work itself created the danger or injury, then the ultimate superior or proprietor is liable to persons injured by a failure properly to guard or protect the work even though the work is intrusted to an independent contractor; and such superior or proprietor cannot shield himself by a plea and proof that the work was so intrusted.[21]

As a final word it might be stated that the whole question comes to the point of when the duty of care arises and ends. It cannot be doubted that the case under discussion falls within the exception as to the liability for maintenance of a nuisance and the fact that the plaintiff was denied recovery in this original suit was due more to faulty pleadings than a denial of his substantive rights.

*W. A. W., 2d.*

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WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF N. J AND PA. ACTS—VALIDITY OF STATUTORY PRESUMPTION OF WAIVER OF COMMON LAW RIGHTS—A decision of considerable importance was rendered in April by the Supreme Court of New Jersey. In the case of *Sexton* v. *Newark Dist. Tel. Co.*[1] that tribunal, by a unanimous opinion, declared in the clearest terms that the Employer's Liability Act in that state was constitutional. This opinion is of especial interest to the bench and bar of Pennsylvania, since the provisions contained in the Workmen's Compensation Act now before the legislature for consideration are, in their constitutional aspects, practically identical with the New Jersey Act[2] which the decision sustains. It seems worth while, accordingly, to point out just how closely these articles of the Pennsylvania Act resemble the sections involved in the New Jersey one, and to indicate exactly how the constitutionality of the latter were upheld.

In regard to the first section of the Act abolishing certain common law defenses, and which is precisely similar in substance and practically so in form, as far as any question of constitutionality is concerned, with the Pennsylvania statute, the New Jersey court said: "Cases are numerous and we think uniform in holding that the defenses modified or abolished by Section I[3] may be modified or abolished by the legislative power when they relate, as here, to an injury sustained by an employee after the legislative provision becomes effective."[4] And further on in the opinion it

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[20] Tarry v. Ashton, *supra;* Chicago v. Robbins, 2 Black 418 (U. S., 1802); Engle v. Eureka Club, 137 N. Y. 100 (1893); Bibbs Adm. v. R. R., 87 Va. 711 (1891); Young v. Lumber Co., 147 N. C. 26 (1898); Callahan v. R. R., 23 Iowa, 562 (1867).

[21] Water Co. v. Ware, 83 U. S. (16 Wall.) 566 (1872).

[1] Not yet reported.

[2] Act of April 4, 1911.

[3] Act I of proposed Penna. Act.

[4] The New Jersey court, after citing many cases in support of thier conclusion, quoted at length from the opinion in the Second Employer's Liability

was declared: "Certainly . . . Section I of the Act is clearly a valid and constitutional amendment."

After disposing of this question the court then considered the constitutionality of Section II of the New Jersey Act,[5] which, like Article II, Section I, of the Pennsylvania[6] one, provides for a scheduled scheme of compensation. It should be noted that in each Act the compensation is to be paid irrespective of the negligence of the employer; and in the principal case it was argued for the defendant that as this provision compelled payment without fault, it could only be binding on the employer with his consent, since otherwise such compulsory payment would deprive him of property "without due process of law." In reply to this contention the court pointed out that the Act itself did not impose liability without fault in a compulsory manner, because this section of the statute was not binding upon the employer unless he chose to accept it; and, if he did not desire to accept this scheduled automatic liability he was perfectly free to declare so and could remain liable under the modified form of common law set forth in Section I.[7] The opinion reads: "Under the Act neither the employer nor the employee is bound to accept the provisions of Section II unless he chooses to do so. If he does not accept, he certainly is not deprived of property without due process of law. If he does accept, then he has given the consent which . . . he must give to bind him." And again, "It is left entirely optional with them (employer and employee) whether they will stand upon the first or second sections of the Act," and, hence, there is no compulsory taking of property without the consent of the party. In view of the fact that the provisions in the Pennsylvania Act which deal with these points are, as has been said, practically identical in their requirements, the same conclusion would seem almost inevitably to be required.

Another point made by the defendant was that, in the case under discussion, the Act impaired the obligation of pre-existing

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Cases, 223 U. S. 1, especially from Page 51, declaring that "A person has no property, no vested interest in any rule of the common law . . . . but the law itself as a rule of conduct, may be changed at the will . . . . of the Legislature unless prevented by Constitutional limitations."

[5] This clause, if accepted, provides for a scheduled scheme of compensation to be made "without regard to the negligence of the employer . . . . when the injury or death . . . . . is the result of an accident arising out of and in the course of the employment except when . . . . intentionally self-inflicted or when intoxication is the proximate cause."

[6] This is almost identical with Act II, sec. 1, of the present Pennsylvania Act, which, when accepted by the parties, provides that the schedule in Sections 5 and 6 of the same article shall determine the compensation to be paid, and the payment thereof shall be made "for personal injury to or for the death of such employee by an accident in the course of his employment . . . . by the employer without regard to negligence . . . . except when the injury or death be intentionally self-inflicted."

[7] This provides, in effect, that if either employer or employee desire to remain under the modified common law liability they can do so by giving notice. Art. II, sec. 3 (*b*) of the Penna. Act. is precisely similar.

contracts. This contention was based upon the fact that the plaintiff was employed by the defendant prior to the time when the Act became effective, but subsequent to the passage of the statute; and it was argued that there was no duty to define their positions until the Act went into effect. Without going into the argument further it is sufficient to say that the court rejected this contention on the ground that the parties could have easily changed their position at any time between the date of the passage of the Act and the time it became effective if they had chosen to do so. The possibility of a similar contention has, it should be noted, been foreseen and provided against in the Pennsylvania Act,[8] which is expressly declared to go into effect at once, but not to apply to accidents arising before July 1, 1913. Hence, this particular question cannot arise in the construction of the statute in Pennsylvania.

Perhaps the chief point of importance in the case, however, is the sustaining of the constitutionality of the legislatively imposed presumption that, with respect to contracts of hiring made subsequent to the Act the parties are conclusively presumed to be acting under the second section[9] unless one party or the other does not, before the accident, expressly elect to operate under the first.[10] This presumption in the New Jersey case under discussion is practically identical in form, substance and meaning with the corresponding clause in the Pennsylvania Act;[11] and, as the court pointed out, was made to favor the adoption of Section II as being the fairest for both parties and as binding until rejected instead of the converse, because such a course seemed least likely to cause trouble to all concerned. It was conceded that some presumptive rule was necessary in order to prevent confusion and useless litigation; and, concerning the validity of the one established, the court said: "Really, the matter comes down to a question of presumption or burden of proof which it is entirely within the control of the legislature to regulate so long as the parties are left entirely free to make whatever contract they choose, as they are in this case. We are, therefore, of the opinion that . . . the section is constitutional."

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[8] Article III, sec. 8; as amended when first submitted to the State Legislature.

[9] Which imposes the automatic liability schedule regardless of the absence of fault of the employer.

[10] Which abrogates most of the common law defences of the employer.

[11] N. J. Act, Sec. II, Act 9. "Every contract of hiring made subsequent to the time . . . . this act takes effect shall be presumed to have been made with reference to the provisions of Section II of this act . . . unless there be . . an express statement in writing, prior to any accident . . . . or on written notice by either party that these provisions are not to apply."

Penn. Act, Art. II, sec. 3 (*a*), "In every contract of hiring . . . express or implied, it shall be conclusively presumed that the parties have accepted the provisions of Art. II of this Act . . . . unless there be . . . an express statement in writing from either party to the other that the provisions of Art. II are not intended to apply."

This statement in the New Jersey case—namely: that as a general rule of law it is well within the constitutional power of the legislature to impose a presumptive rule of evidence, provided that a fair and reasonable opportunity to rebut the same is also afforded—is undoubtedly correct.[12] It is submitted, however, that the real point involved is of a more intricate nature and turns upon the question of the power of a state legislature to enact a presumption that common law rights are waived and a statutory remedy in itself unconstitutional accepted unless such common law and constitutional rights and privileges be expressly and affirmatively claimed by the parties. It should also be noted that this presumption is more than a mere doctrine of evidence under the principles just cited, and is, in reality, an absolute rule of law. It is believed, however, that the contention that this statutory created presumption is unconstitutional can be disposed of and the validity of such a provision upheld. In the first place, it is settled that in civil proceedings the protection of a constitutional provision may be waived.[13] It has also been decided that where a claimant voluntarily avails himself of a statutory remedy instead of resorting to that given him at common law he is regarded as having taken this statutory remedy with all its incidents and cannot complain of any resulting infringement of his constitutional rights.[14] Now the terms of the New Jersey and Pennsylvania Acts afford the parties a perfectly fair chance to choose between remaining under the modified form of common law liability and accepting the automatic schedule of compensation. In fact the only way in which the case quoted is distinguishable consists in the fact that under these Acts there is a presumptive acceptance of the statutory form which must be removed by affirmative steps while under the decision *ante* there is no original handicap upon the plaintiff's course of action. It is believed, however, that the mere imposition of this presumption should not be regarded as unduly burdensome and, therefore, invalid under the doctrine of *Ex parte Young*.[15] Finally, on the direct question raised, it has been expressly decided in *Foster* v. *Morse*[16] that statutes of this kind, establishing presumptive rules of law that parties are regarded as having waived their constitutional rights unless they affirmatively assert them, are constitutional[17] and valid exercises of the legislative power.

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[12] Fong v. U. S., 149 U. S. 698 (1892); R. R. Co. v. Turnipseed, 219 U. S. 535 (1910); Adams v. N. Y., 192 U. S. 585 (1903).

[13] Budge & Turnpike Co., v. Norfolk, 6 Allen 353 (Mass., 1863), affirmed in 201 Mass. 23 (1909); Vose v. Cochroft, 44 N. Y. 415 (1871); affirmed in 164 N. Y. App. 258 (1900).

[14] Ralston v. Brusler, 120 Ohio, 105 (1861).

[15] 209 U. S. 123 (1907).

[16] 132 Mass. 354 (1882).

[17] The decision of the State courts upon questions of this character is conclusive; and the Federal courts will not take jurisdiction, on the ground that such waivers of constitutional provisions do not in themselves present any Federal question. Leonard v. U. S. & Pac. R. R. Co., 198 U. S. 416 (1904); M. J. & Kan. City R. R. Co. v. Mississippi, 210 U. S. 187, 204 (1907).

Therefore, since the opinion of the New Jersey court in regard to most of the constitutional questions involved seems almost conclusive and since the provisions of the Pennsylvania Act are, as has been shown, in these aspects practically identical with those of the New Jersey Statute, and finally, since the determination of the Massachusetts court in *Foster* v. *Morse*[18] seems decisive of the only really doubtful provision, it would appear entirely clear that the Pennsylvania Act, if passed in its present form, must and should of necessity be sustained as constitutional and valid by the judicial tribunals of this state.

*P. C. M., Jr.*

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[18] Note 16, *supra*.